REPLY BRIEF FOR PETITIONER

The question in this case is whether due process requires the State to take any further action to attempt to provide notice of an impending deprivation of property when the State learns that its initial effort has failed. This Court's decision in *Mullane* provides the answer: The State is required to do what a reasonable person who actually desired to provide notice would do under the circumstances. Faced with the prompt return of unclaimed mail and the impending sale of an $80,000 house, such a person would take further reasonable steps to try to provide notice. Those steps would include checking readily available sources for a better mailing address, contacting the occupants of the house, and posting a notice on the property.

The State and Solicitor General disagree with this proposition, arguing that a reasonable person would send only one notice, based on information in hand, and would do nothing more when that notice was promptly returned unclaimed. They err by asserting that the sufficiency of the notice effort is judged only by what the State knew when the initial notice attempt was made, rather than at the time the property was taken. And they ignore that, in this case, there were two different tax sales for which notice was required, and notice of the second was sent thirty-four months after the State knew that its chosen notice method was likely a futile gesture.

The State and Solicitor General also argue that it was reasonable to take no action following prompt return of the mailed notices because a state statute requires property owners to report a change of address; return of the letters "unclaimed" did not inform the State that its notice attempt had failed; and, even without notice, Mr. Jones should have realized that his property was about to be lost. As explained below, these arguments improperly attempt to shift the State's constitutional obligations to Mr. Jones and rest on assumptions that have no record support.

The State and Solicitor General further argue that requiring reasonable follow-up steps after an initial notice effort fails would result in costs and administrative burdens that could hinder the government's ability to collect revenue. That argument is fundamentally flawed because in Arkansas, as in most states, the cost of notice is borne by the redeemer or purchaser of the property. Ark. Code Ann. § 26-37-104(a). Indeed, redemption of property by the owner is the most efficient way to collect back taxes. Moreover, the feasibility of follow-up notice efforts is demonstrated by the fact that many state statutory schemes, the most analogous federal statutory scheme, and the vast majority of state and federal court decisions *already* require such efforts under the circumstances presented here. In any event, under basic due process principles, the extent of any additional steps will be constrained by what is reasonable under the circumstances, taking into account the value, importance, and character of the property interest at stake.[1]

A. The Sufficiency Of Notice Must Be Judged In Light Of All The Circumstances And Not Just On What The State Knew When The First Notice Was Sent.

The parties agree that due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" and that "[t]he

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[1] In her separate brief, respondent Flowers argues that certiorari was improvidently granted because Mr. Jones did not challenge the constitutionality of Ark. Code Ann. § 26-35-705. The same argument was raised in Respondents' Brief in Opposition at 11-12 and fully rebutted in Mr. Jones's petition-stage reply at 6. The question presented is whether due process requires additional reasonable steps to notify a property owner of an impending tax sale where the government knows that its initial effort has failed. Mr. Jones does not challenge § 26-35-705, and, thus, any claim that a challenge to that statute was not preserved for review is a non sequitur.

means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). The parties further agree that due process does not always require receipt of actual notice before property is taken.[2] *See Dusenbery v. United States*, 534 U.S. 161, 170 (2002). And the parties agree that mail can be an adequate means of providing notice when the interested party's correct address is known or can be ascertained. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798-800 (1983); *Greene v. Lindsey*, 456 U.S. 444, 455 (1982); *Mullane*, 339 U.S. at 318-19. The parties' dispute centers on whether due process requires the government to take further steps to try to provide notice when it promptly learns that its initial effort has failed.

Both the State and the Solicitor General argue that whether notice is "reasonably calculated" to inform the interested party is judged solely on the basis of what the sender knew at the time the initial notice was sent and that any later-acquired information is of no constitutional significance. State Br. 22-23; SG Br. 10-12. The State and the Solicitor General read *Mullane*'s phrase "under all the circumstances" to mean "under the circumstances known before notice is first attempted." But

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[2]Respondents and the Solicitor General note that Mr. Jones's complaint alleges that he was never given "actual notice" of the sale or of his right to redeem, and that the failure to give "actual notice" violated his right to due process. *See* JA 5. "[T]he term 'actual notice' is not free from ambiguity" and "the term has been used both to distinguish notice by mail from notice by publication and to refer to the actual receipt of the notice by the intended recipient." *Dusenbery*, 534 U.S. at 170 n.5 (adopting the latter use of the term). When he filed his complaint, Mr. Jones was unaware that the State had attempted to provide notice by mail. In any event, Mr. Jones has consistently argued that the State failed to provide notice reasonably calculated under all the circumstances to inform him of the sale.

that inventive reading is contrary to *Mullane*'s explanation of the standard and fails to recognize that the operative question is whether notice was adequate at the time of the taking.

In *Mullane*, the Court explained that due process is satisfied if the effort made is what a person who actually desired to give notice would do under the same circumstances. Thus, for its view to prevail, the State must argue that a reasonable person who actually desired to communicate with Mr. Jones would ignore the return of the initial mailing and would take no action to ascertain Mr. Jones's correct address or to contact him by other means. Under the circumstances of this case, a reasonable person would not give up so soon. Rather, such a person would seek Mr. Jones's address from readily available sources, contact the occupants of the property, or post a notice at the property. *See, e.g., Small v. United States*, 136 F.3d 1334, 1337 (D.C. Cir. 1998) ("A reasonable person presented with a letter that has been returned to sender" will take further action "if it is practicable to do so."); *Malone v. Robinson*, 614 A.2d 33, 38 (D.C. 1992) ("The return of the certified notice marked 'unclaimed' should have been a red flag for some further action.")

The State seeks to distinguish *Robinson v. Hanrahan*, 409 U.S. 38 (1972), and *Covey v. Town of Somers*, 351 U.S. 141 (1956), by emphasizing that, in those cases, the government knew before the initial mailing that the notice would likely be ineffective, whereas in this case, the State did not know its initial mailing was not received until it was returned about two weeks later. The key fact, however, is that the State knew that notice was ineffective about three years before Mr. Jones was deprived of his property. The constitutional violation—a deprivation of property without due process of law—did not occur when the State sent the letter; it occurred when the State sold Mr. Jones's property, knowing that he had not received

notice and having failed to make any effort to rectify the deficiency. Thus, as in *Robinson* and *Covey*, the State knew before it consummated the deprivation that its notice had failed. *See Small*, 136 F.3d at 1337 (holding that, following return of initial mailed notice, *Mullane* requires reasonable attempts to locate the interested party and provide effective notice until forfeiture is final).

The State relies on *Garcia v. Meza*, 235 F.3d 287 (7th Cir. 2000), but that decision *rejected* the rule urged by the State. *Id.* at 291 ("We decline to adopt a per se rule which only examines notice at the time it was sent and turns a blind eye to subsequent events."). Although *Garcia* declined to require the government to seek out claimants in *every* case where initial notice is returned undelivered, the court held that due process had *not* been satisfied even though the notice "was adequate at the time that the notice was sent." *Id.* at 290. *Garcia* held that, because "[t]he government certainly had reason to believe that its one attempt at written notice" had been ineffective, "another attempt at written notice" was required and "would not have been too burdensome on the government." *Id.* at 291.

The State also cites *Karkoukli's, Inc. v. Dohany*, 409 F.3d 279 (6th Cir. 2005). However, in *Karkoukli's*, the Sixth Circuit found it unnecessary to resolve the issue because after "[a]ll the mailed notices were returned as undeliverable by the postal service," the government "attempted to locate [the interested party's] home address in the phone book and on the internet, but did not succeed." *Id.* at 281. The other two federal appellate decisions cited by the State, *Sarit v. Drug Enforcement Admin.*, 987 F.2d 10, 14-15 (1st Cir. 1993), and *Madewell v. Downs*, 68 F.3d 1030, 1047-47 (8th Cir. 1995), do support the theory that, absent exceptional circumstances, the sufficiency of notice is measured when initially sent. Nonetheless, those cases and later cases in those circuits hold

out the possibility that post-notice events will have constitutional relevance. For example, *Whiting v. United States*, 231 F.3d 70, 76 (1st Cir. 2000), held that the government may reasonably assume that certified letters are delivered only "[a]bsent proof to the contrary." *See United States v. Ritchie*, 342 F.3d 903, 911 n.2 (9th Cir. 2003) (noting that the First Circuit has "retreated from its *Sarit* holding"). Similarly, the Eighth Circuit has retreated from *Madewell*, holding in a later case that even certified mail actually received by an individual living at the interested party's house may not have satisfied due process when the government had reason to believe that the party may not have known of the forfeiture proceeding. *United States v. Cupples*, 112 F.3d 318, 319 (8th Cir. 1997). Every other federal circuit that has addressed the issue has held that the government must take additional steps to provide effective notice when it is promptly informed that its initial effort has failed.[3] A majority of the state courts that have addressed the issue also have held that the *Mullane* standard requires reasonable follow-up efforts when the government learns that its initial mailed notice was not received.[4] Thus,

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[3] *See, e.g., Plemons v. Gale*, 396 F.3d 569, 576 (4th Cir. 2005); *Akey v. Clinton County*, 375 F.3d 231, 236 (2d Cir. 2004); *Ritchie*, 342 F.3d at 911 (9th Cir.); *Foehl v. United States*, 238 F.3d 474, 479-80 (3d Cir. 2001); *Small*, 136 F.3d at 1337 (D.C. Cir.); *United States v. Rodgers*, 108 F.3d 1247, 1252 (10th Cir. 1997); *Armendariz-Mata v. Drug Enforcement Admin.*, 82 F.3d 679, 683 (5th Cir. 1996).

[4] *See, e.g., Hamilton v. Renewed Hope, Inc.*, 589 S.E.2d 81, 85 (Ga. 2003); *Kennedy v. Mossafa*, 789 N.E.2d 607, 611 (N.Y. 2003); *Wells Fargo Credit Corp. v. Ziegler*, 780 P.2d 703, 705 (Okla. 1989); *Rosenberg v. Smidt*, 727 P.2d 778, 781-83 (Alaska 1986); *Giacobbi v. Hall*, 707 P.2d 404, 407 (Idaho 1985); *Vinscon, Inc. v. Ingram*, 835 So. 2d 813, 816 (La. Ct. App. 2002); *City of Boston v. James*, 530 N.E.2d 1254, 1256 (Mass. App.

(continued...)

Sarit, *Madewell*, and the five state court cases cited by the State, St. Br. 22 n.12, reflect a decidedly minority view.

The Solicitor General joins the State in arguing that Mr. Jones's right to due process was extinguished as soon as the government made "one reasonable effort to provide notice" and that all later-acquired information is irrelevant, even if it is acquired when there is ample time to take steps to correct the deficiency. SG Br. 9. By casting the issue as whether the reasonably calculated test "views the notice question *ex ante*, from the government's standpoint at the time that notice is to be given, [or] *ex post*, from the intended recipient's standpoint after his actual whereabouts have been made clear," SG Br. 11, the Solicitor General makes the same error as does the State. It overlooks that there is a third, more reasonable view: namely, that the government must consider information acquired after the initial notice attempt but *before the deprivation* in determining whether, under the circumstances, a *reasonable* person would take further action to find a better address or otherwise ensure meaningful notice. To be clear, Mr. Jones does *not* insist that notice be judged by whether, with the benefit of hindsight, the property owner can point to methods by which he could have been found. Rather, Mr. Jones argues that the government must consider information it acquires *after* the initial notice attempt but *before* the deprivation.

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[4](...continued)
Ct. 1988); *Patrick v. Rice*, 814 P.2d 463, 468 (N.M. App. 1991); *O'Brien v. Port Lawrence Title & Trust*, 688 N.E.2d 1136, 1145 (Ohio Ct. Common Pleas 1997); *Bank of America v. Giant Inland Empire R.V. Ctr., Inc.*, 93 Cal. Rptr. 2d 626, 635 (Cal. Ct. App. 2000).

B. The State Acted Unreasonably When It Sent Notice Of The Negotiated Sale By The Same Method That Had Failed To Notify Mr. Jones Of The Public Sale.

Even if the Court accepts the view that the State violates due process only when it knows prior to mailing that the notice will likely fail, Mr. Jones must still prevail because, when the State attempted to notify him of the *negotiated* sale, the State knew that sending a certified letter to Mr. Jones at the Bryan Street address was likely a "mere gesture." *Mullane*, 339 U.S. at 315. The State knew that such notice was not reasonably calculated to reach Mr. Jones because the same procedure had failed thirty-four months before. *Greene*, 456 U.S. at 455-56 ("[T]he State's continued exclusive reliance on an ineffective means of service is not notice 'reasonably calculated to reach those who could easily be informed by other means at hand.'") (quoting *Mullane*, 339 U.S. at 319).

The State sent the first certified letter to Mr. Jones in April 2000 to notify him of the delinquency and his right to redeem the property before or within thirty days after the public sale scheduled for two years later. *See* Ark. Code Ann. § 26-37-301(b)(2) (requiring notice of the sale date which must be "no earlier than two (2) years after the land is certified to the Commissioner of State Lands"). The letter was promptly returned to the State marked "unclaimed." Mr. Jones's house was offered for public sale on April 17, 2002, but was not sold.

Because the property was not sold at public sale, the State was authorized to negotiate a sale. Ark. Code Ann. § 26-37-202(b). On February 5, 2003, the negotiated sales process began when respondent Flowers submitted a purchase offer. Again, Mr. Jones was entitled to notice of the sale date and of his right to redeem the property until thirty days after the sale. Ark. Code Ann. §§ 26-37-301(b)(2) & 202(e). On February 19, 2003, the State sent notice of the negotiated sale by certified

mail to Mr. Jones at the Bryan Street address. JA 15. At that time, the State had known for thirty-four months that the public sale notice sent by the same method had failed to reach Mr. Jones. Thus, even if it was reasonable in April 2000 for the State to send the public sale notice to Mr. Jones at the Bryan Street address, it was not reasonable to repeat that failed procedure—and *only* that failed procedure—to notify Mr. Jones of the negotiated sale. By February 2003, knowing that Mr. Jones had not received the previous mailed notice, the State had an obligation to attempt to ascertain Mr. Jones's correct mailing address or to consider alternative means of contacting Mr. Jones.

Indeed, at the time it sent notice of the negotiated sale, the State believed (mistakenly) that the Bryan Street house was vacant. After receiving Ms. Flowers's purchase offer, the State conducted "negotiated sale research" that involved a visit to the Bryan Street address to verify that the property existed as described in the deed records and to provide a description of the house and vicinity. The field investigator who viewed the property reported that "the property does appear to be vacant." R 110. Even so, the State, now acting on the belief that certified mail notice would almost certainly be futile, used that procedure without making any effort to ascertain Mr. Jones's correct mailing address.

The State and the Solicitor General concede that, at a minimum, *Robinson* and *Covey* establish that where the government already has information indicating that its method of notice is likely to be ineffective, such notice will not satisfy due process. State Br. 21; SG Br. 13-14. Because the State knew, prior to its mailing, that a notice sent by certified mail to the Bryan Street address was not reasonably calculated to reach Mr. Jones, the State acted in the same manner that it concedes this Court found unconstitutional in *Robinson* and *Covey*.

C. The State Cannot Avoid Its Due Process Obligations By Claiming That It Lacked Knowledge That Its Mailed Notice Had Failed Or By Charging That Mr. Jones Abandoned The Property.

The State argues that even if due process requires further action once the State knows its original notice efforts have failed, the State cannot be charged with such knowledge in this case because the prompt return of the certified mail notices marked "unclaimed" "did *not* inform the State that Jones was no longer living at the address[.]" State Br. 16 (emphasis in original); *see also* SG Br. 21 (same). This argument is a red herring. The question is not whether the State knew that Mr. Jones had moved, but whether it knew that the mailed notices were not received.

1. In a stroke of great irony, the State maintains that its use of certified mail provides more protection to the property owner than regular mail. But the use of certified mail benefits the addressee only derivatively, *if* the sender takes action when it learns that the certified mail was not received.[5] In this case, the State wants credit for using certified mail, but wants relief from its obligation to act where the use of certified mail informs the State that its efforts have failed. In other words, the State's position in this Court makes its use of *certified* mail utterly meaningless.

2. The State also claims that it "could properly assume that any absent property owner had either abandoned his property or left it in the hands of a responsible caretaker." State Br. 18. In fact, Mr. Jones *did* leave his property in the hands of

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[5] "Certified Mail is dispatched and handled in transit as ordinary mail." U.S. Postal Serv., *Domestic Mail Manual* § 503.3.2.1 (Jan. 8, 2006). Thus, it is no more likely to reach its destination than other mail.

responsible caretakers, and if the State had posted a notice on the property or mailed it to "occupant," the caretakers would have notified Mr. Jones, just as they did when Ms. Flowers had the eviction notice served on the occupants.

3. The State further argues that the return of the letters marked "unclaimed" supports an inference that Mr. Jones or the residents of the property saw the return address on the envelopes and, acting contrary to their interests, refused to accept service. However, no evidence indicates that Mr. Jones or the occupants ever saw the envelopes, and the letters were not marked "refused." Although postal service procedures call for the mail carrier to leave a form with a space for identifying the sender, no record evidence even suggests that such a form was left at the house or that it was properly completed, or that the occupants would know the subject of a letter sent by the "Commissioner of State Lands." To the contrary, the record suggests that neither Mr. Jones nor his wife knew that the State had attempted to provide notice by certified mail to the Bryan Street address until four months into this litigation, when the State filed the affidavit of Patricia Lah in support of its summary judgment motion. JA 11; R 50. Thus, this case is not one where the caretaker of the property ignored a "direct attack" upon the owner's rights. *Mullane*, 339 U.S. at 316.

D. It Was Unreasonable For The State To Conclude That It Had Sent Notice To The Best Address Available Or To Rely On "Inquiry-Notice."

The State maintains that it was reasonable to ignore the return of the mailed notices and to not seek Mr. Jones's correct address because Ark. Code Ann. § 26-35-705 requires property owners to report an address change. Thus, according to the State, § 26-35-705, coupled with the presumption that a person knows his legal obligations, supports the conclusion that the State had used the best available address for Mr. Jones even

though the mailings were promptly returned.[6] Similarly, the Solicitor General repeatedly notes that Mr. Jones provided the address to which the notices were sent, SG Br. 7, 16, but downplays the fact the Mr. Jones provided it in 1967, thirty-three years before the State first used that address to send notice that the property taxes had not been paid.

The knowledge gained from the prompt return of the mailed notices in 2000 and 2003 clearly outweighs the State's reliance on § 26-35-705 and the address provided by Mr. Jones in 1967. Indeed, a party's address may be—and here was—"reasonably ascertainable" from sources other than the records of the property tax collector. *See Mennonite*, 462 U.S. at 800 (requiring "[n]otice by mail or other means as certain to ensure actual notice . . . if [the party's] name and address are reasonably ascertainable"); *Mullane*, 399 U.S. at 317 (requiring "due diligence" to ascertain whereabouts of interested party).

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[6]The State concedes that Mr. Jones's failure to comply with § 26-35-705 did not affect his right to constitutionally sufficient notice. State Br. 19. The Solicitor General agrees. SG Br. 16 n.5 (quoting *Mennonite*, 462 U.S. at 799 ("[A] party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation.")). Indeed, the view that minimum due process requirements may be circumscribed by state law because property interests themselves are a creature of state law—that, in other words, a property owner "must take the bitter with the sweet"—has been soundly rejected by this Court. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 540-41 (1985) ("[I]t is settled that the 'bitter with the sweet' approach misconceives the constitutional guarantee . . . . The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures."). The right to due process "is conferred, not by legislative grace, but by constitutional guarantee." *Id.* (citation omitted); *see also Vitek v. Jones*, 445 U.S. 480, 491 (1980) (holding that "minimum [procedural] requirements [are] a matter of federal law" and "are not diminished by the fact that the State may have specified its own procedures that it may deem adequate").

The State further argues that its failure to provide notice should be excused because "the failure to pay property taxes is not the type of omission that can be characterized as unknowing or innocent." State Br. 18. Thus, according to the State, Mr. Jones must have known that his house was about to be lost. Indeed, both the State and the Solicitor General repeatedly charge that Mr. Jones knowingly stopped paying his taxes after he had done so for thirty years. State Br 4; SG Br. 4. That is not correct. Mr. Jones purchased the house in 1967 with a thirty-year mortgage, and the mortgage company paid the property taxes until 1997. Thus, Mr. Jones did not knowingly stop paying his taxes—he inadvertently failed to begin paying them after the mortgage was retired. The State does not claim that Mr. Jones was ever sent a tax bill, although Ark. Code Ann. § 26-35-705 requires that the tax collector send a statement each year. Rather, the State argues that "after failing to receive a property tax bill and pay property taxes," Mr. Jones was on "inquiry-notice" of the pending tax sale. State Br. 18. This Court has held the opposite: An interested party's "knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending." *Mennonite*, 462 U.S. at 800.

In any event, the property owner's "innocence" or lack thereof is irrelevant to the due process analysis. For example, notice may allow a property owner to contest the forfeiture on the ground that the taxes were, in fact, paid, or simply to exercise the owner's substantive right to redeem the property. Regardless, the property owner is entitled to notice. *See Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86-87 (1988) (absent notice, default judgment set aside even where parties agreed that judgment debtor had no defense on merits).

E. Where The State Learns That Its Initial Notice Attempt Has Failed, Reasonable Follow-Up Efforts Will Not Disrupt Its Ability To Collect Taxes.

Both the State and the Solicitor General predict that the cost and burden of taking reasonable follow-up steps to provide effective notice will hinder the government's ability to collect taxes or take property. For many reasons, their dire predictions are unfounded.

First, and fundamentally, the cost of providing effective notice will not be borne by the State—it will be passed on to either the owner who redeems the property or the tax-sale purchaser who buys it. Ark. Code Ann. § 26-37-104(a) ("All costs of notice shall be added to the costs to be collected from the purchaser or redeemer."). Most states have similar statutes that pass the costs associated with tax sales to the purchaser or redeemer of the property.[7] In addition, because governments increasingly sell property tax liens to private investors through securitization programs or bulk sales, they "have begun to view their delinquent tax digests as potential assets rather than

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[7]Cal. Rev. & Tax. Code § 3704.7(c); Haw. Rev. Stat. Ann. § 246-55(d); Idaho Code § 63-1005(3); La. Rev. Stat. Ann. §§ 47:2183.1, 47:2189, 47:2261(C); Me. Rev. Stat. Ann. tit. 36, § 1078; Md. Code Ann., Tax-Prop. §§ 14-813(e)(1), 14-843; Mich. Comp. Laws Ann. § 211.60; Minn. Stat. Ann. § 281.23(8); Miss. Code Ann. §§ 27-43-3, 27-45-3; Mo. Ann. Stat. § 140.405; Mont. Code Ann. § 15-18-112; Nev. Rev. Stat. Ann. §§ 361.5648(5), 361.595(2); N.H. Rev. Stat. Ann. § 80:38-a; N.J. Stat. Ann. §§ 54:5-6, 54:5-61; N.Y. Real Prop. Tax Law § 1110(1); N.D. Cent. Code § 57-28-04(5); Ohio Rev. Code Ann. §§ 5721.25, 5721.38(B)(4), 5721.39; Okla. St. Ann tit. 68, § 3118(A); Or. Rev. Stat. § 312.120(2); 72 Pa. Cons. Stat. Ann. § 5860.602(i); R.I. Gen. Laws § 44-9-27(a); S.D. Codified Laws § 10-25-9; Tenn. Code Ann. §§ 67-5-2501(a), (b)(3); Utah Code Ann. §§ 59-2-1351.1(4), 59-2-1346; Va. Code Ann. §§ 58.1-3965(A), (B), 58.1-3974; Wash. Rev. Code Ann § 84.64.050; W. Va. Code Ann. §§ 11A-3-21, 11A-3-2(c), 11A-3-23(a)(3); Wis. Stat. Ann. § 75.12(4).

administrative burdens." Frank Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind. L.J. 747, 760 (2000) ("[M]ost jurisdictions in the United States permit a private third party to purchase the local government's lien for the taxes due.").

Second, in claiming that follow-up notice will be costly, the State has it exactly backwards. Redemption of property by the owner is the most efficient way for the State to collect past-due taxes. Had the State provided effective notice to Mr. Jones, it would have been able to promptly collect the taxes due. Instead, the State embarked on a cumbersome process that entailed a failed auction followed by a labor-intensive negotiated sale.

Third, the feasibility of providing follow-up notice is demonstrated by the fact that such steps are already required in the majority of jurisdictions where the courts have addressed the issue (*see supra* at 6-7 & nn. 3-4), and many state statutes require such steps, either initially or in response to a failed mailing. For example, California requires the tax collector to make a reasonable effort to ascertain the address of the taxpayer and requires an examination of the tax rolls, the most recent telephone books in the county in which the property is located, and the telephone books covering the area of the last known address of the taxpayer. Cal. Rev. & Tax. Code § 3365. Where the tax bill is mailed to the same address as the property itself, California law requires that the tax collector make a reasonable effort to contact the owner-occupant in person. Cal. Rev. & Tax. Code § 3704.7. In Mississippi, if the initial letter is returned undelivered, the clerk must make "further search and inquiry" to ascertain the owner's address, and must repeat the inquiry if the letter returns undelivered again. Miss. Code Ann. § 27-43-3. In Nevada, if a letter mailed "return receipt requested" returns unsigned, the county treasurer must "make a reasonable attempt to locate and notify the owner." Nev. Rev.

Stat. Ann. § 361.595(3)(b). Where mailed notification is returned without a receipt bearing the interested party's signature, Pennsylvania requires that the tax bureau "exercise reasonable efforts to discover the whereabouts" of the interest-holder, including "a search of current telephone directories for the county." 72 Pa. Cons. Stat. Ann. § 5860.607a. In Rhode Island, if notice addressed to the taxpayer's last known address is returned, a city officer may be petitioned to "make a personal inquiry into the whereabouts of the taxpayer. The inquiry shall include visits to the taxpayer's premises, and inquiries with neighbors, known relatives, employers, and any other person or entity who the officer may reasonably conclude has information to the whereabouts of the taxpayer." R.I. Gen. Laws § 44-9-25.1(2).

Similarly, the assertion that posting notice on the property or contacting the occupants would impose an insurmountable burden on the State is belied by the fact that State personnel visited the property in this very case, as is standard procedure for negotiated sales, and could have then posted a notice virtually cost free.[8] Indeed, the feasibility of contacting the occupants is shown by the ease with which Ms. Flowers served them with an eviction notice immediately after the post-sale redemption period expired. Moreover, the feasibility of posting and contacting occupants is demonstrated by the "current practice" in many states and under certain federal statutes. *Connecticut v. Doehr*, 501 U.S. 1, 17-18 (1991) (basing conclusion of due process feasibility on a survey of state law).

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[8]The State and Solicitor General claim that posting would be impossible because 18,000 parcels of Arkansas real estate are certified as tax delinquent each year, but they offer no estimate of the number of mailed notices of delinquency that are returned unclaimed.

At least eight states require posting on the property,[9] either at the outset or as a follow-up measure, and at least thirteen states require notice to the occupants,[10] as do some federal statutes.[11] Although posting will not always be effective, *see, e.g.*, *Greene*, 456 U.S. at 452-53; *Schroeder v. City of New York*, 371 U.S. 208, 282 (1962), it is often a practical and efficient way to reach an owner of real property. In the circumstances of this case, notice to the occupants of the house would have been an intuitively reasonable step. The State acknowledges that an absent property owner will often leave the property "in the hands of a responsible caretaker with a 'duty to let him know' if his interest is in jeopardy." State Br. 10 (quoting *Mullane*). A mailed, personally served, or posted notice—addressed to *occupant* rather than to the owner—is a reasonable way to reach such a caretaker, and takes advantage of the natural alignment of the interests of the property owner with the occupant's

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[9]Del. Code Ann. tit. 9, §§ 8772 & 8724; Fla. Stat. Ann. § 197.522(2)(a); Ga. Code Ann. § 48-4-78(d); Haw. Rev. Stat. Ann. § 246-56; Md. Code Ann., Tax-Prop § 14-836(b)(6); Minn. Stat. Ann. § 281.23(6); Okla. Stat. Ann. tit. 68 § 3118(A); S.C. Code Ann. § 12-51-40.

[10]Ga. Code Ann. § 48-4-45(a)(1)(B); 35 Ill. Comp. Stat. §§ 200/21-75(a), 200/22-10, 200/22-15; Me. Rev. Stat. Ann. tit. 36, § 1073; Md. Code Ann., Tax-Prop. § 14-836(b)(4)(i)(2), (b)(4)(iv); Mich. Comp. Laws Ann. § 211.78i(3); Minn. Stat. Ann. §281.23(6); Mont. Code Ann. § 15-18-212(1)(a), (2)(a); N.D. Cent. Code § 57-28-04 (3); Okla. Stat. Ann. tit. 68 § 3118; S.D. Codified Laws § 10-25-5; Utah Code Ann. § 59-2-1351(2)(a); Wis. Stat. Ann. § 75.12(1); Wyo. Stat. Ann. § 39-13-108.

[11]For example, the Federal Debt Collection Practices Act requires written notice to the tenants of the real property subject to sale. 28 U.S.C. § 3203(g)(1)(A)(i)(IV). Foreclosures by the Secretary of Housing and Urban Development require notice to the occupants of the property, 12 U.S.C. § 3758(2)(A)(iii), and, if the occupants' names are unknown, notice to be posted on the property. *Id.* § 3758(2)(B)(ii).

interest in stable housing, which will induce her to contact an absentee owner.

The Solicitor General filed his brief in this case "[b]ecause a number of federal agencies have the ability to seize property in certain situations." SG Br. 1. But in arguing that additional efforts to locate property owners would impose onerous administrative burdens, the Solicitor General conspicuously fails to discuss the most obvious federal counterpart to the process at issue here: that used by the IRS before selling property seized to collect delinquent federal taxes. Because "[t]he consequences of seizure and sale are often staggering and irreversible . . . Congress has imposed precise strictures on the seizure and sale of property to satisfy legitimate tax deficiencies." *Reece v. Scoggins*, 506 F.2d 967, 971 (5th Cir. 1975). Before it may sell such property, the IRS must personally serve the owner with notice or leave notice at the owner's actual home or business. 26 U.S.C. § 6335(a); *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 377 F.3d 592 (6th Cir. 2004), *aff'd on other grounds*, 125 S. Ct. 2363 (2005). Only if personal service has been attempted and "the owner cannot be readily located," 26 U.S.C. § 6335(a), may the IRS resort to sending certified mail to the last known address. *Powelson v. United States*, 979 F.2d 141 (9th Cir. 1992) (holding that the IRS must make "a reasonable attempt to personally serve" the property owner before mailing notice). These requirements, which have been strictly enforced by the federal courts for more than fifty years, belie the Solicitor General's claims of administrative burden.

The Solicitor General asserts that the ease with which Mr. Jones could have been found is apparent only *ex post* with the benefit of hindsight, and both the State and the Solicitor General complain that they had no way of knowing that Mr. Jones could easily have been found and that there are

restrictions on the State's ability to search its own records. These arguments miss the mark. First, the State did not know how easily it could have located Mr. Jones only because it did not try to find him.[12] Second, it would have been reasonable to look first for Mr. Jones in Little Rock or in Arkansas because Census Bureau data indicates that most people who move stay close to their earlier homes.[13] Third, the claim that privacy laws would prohibit the State from finding Mr. Jones's correct address in the State's own records is vastly overstated.[14]

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[12]The minimal cost of such a search is demonstrated by the fact that address-updating and skip-tracing are the standard practice in distributing benefits in class actions, even when the individual property interests at stake are generally far lower than they are in the context of real property foreclosures. *See* S. Rossman and D. Edelman, *Consumer Class Actions* (5th ed. 2002) § 13.2.3 at 174-75 ("With the advent of the Internet, it has become quite simple to track down many individuals" using websites that "provide addresses for no charge. Another inexpensive way to locate individuals is to order a partial credit report."). The use of skip-tracers can be particularly effective. *Id.* ("[W]ithout skip tracers, typical consumer class actions will distribute benefits to only twenty-five percent of the class. Using skip-tracers can increase the percentage of members receiving benefits to seventy-five percent."). Moreover, "[m]ost skip-tracers work on a contingent fee basis and therefore will only be paid if they find the class member's correct address" and the cost of skip-tracing or address locating is sometimes deducted from the recovery of class members who are found. *Id.*

[13]For example, in 2003, 59% of people who moved stayed in the same county; an additional 19% stayed in the same state. U.S. Census Bureau, *Geographical Mobility 2002-2003* (2004).

[14]For example, although drivers' license information is generally protected, *see* Ark. Code Ann. § 27-50-906, the statute contains an exception for any agency that needs the information to carry out its statutory duties. Ark. Code Ann. § 27-50-906(a)(7)(A). The federal statute that protects the privacy of state motor vehicle records has a similar exception. 18 U.S.C. § 2721(b)(1). Similarly, Arkansas voter registration data is available to the public. *See* Ark. Const., am. 51.

Finally, due process does not require that further efforts be made at any cost until success is achieved. Rather, due process requires the State to consider steps that might result in more effective notice and to engage in such steps as are reasonable under the circumstances, taking into account the burden of making additional efforts in light of the value and importance of the property interest at stake. Here, the State struck that balance in a way that offends due process.

CONCLUSION

The decision below should be reversed and the case remanded for further proceedings.

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No. 04-1477

In the Supreme Court of the United States

GARY KENT JONES, PETITIONER

v.

LINDA K. FLOWERS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment required the State of Arkansas to search for an alternative address for a delinquent taxpayer when notices of the tax sale and right to redeem that were sent to his last known address by certified mail were returned "unclaimed."

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ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case presents the question whether the State of Arkansas satisfied constitutional due process standards for notice when it seized and sold property belonging to petitioner after he failed to pay his taxes on his real property. Because a number of federal agencies have the ability to seize property in certain situations upon giving adequate notice, the United States has a substantial interest in the question presented. Under the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. 3001 *et seq.*, for example, the federal government may enforce judgments through the seizure of property. Before a sale of property may be undertaken, the government must publish notice of the sale and "serve written notice of public sale by personal delivery, or certified or registered mail to each person whom the marshal has reasonable cause to believe * * * has an interest in property under

execution * * * to the last known address of each such person." 28 U.S.C. 3203(g)(1)(A)(i)(IV).

The Small Business Administration (SBA), see 15 U.S.C. 636(a)(6), and the Department of Agriculture make loans that may be secured by real property that may become subject to foreclosure proceedings. See 42 U.S.C. 1471 (loans by Secretary of Agriculture); see also 7 C.F.R. 3550.59(a)(1), 3550.108. Notices of delinquency and foreclosure frequently must be sent to the borrowers on such loans. The Secretary of Housing and Urban Development also has authority to foreclose on single-family property pursuant to 42 U.S.C. 3535(i) and 12 U.S.C. 3753. Notice of foreclosure proceedings pursuant to 12 U.S.C. 3753 must be provided by certified or registered mail, 12 U.S.C. 3758(2)(A), and notice "shall be deemed duly given upon mailing, whether or not received by the addressee and whether or not a return receipt is received or the notice is returned." 12 U.S.C. 3758(2)(C).

The government also forfeits property in a variety of circumstances. For example, the customs laws have long provided for the seizure and civil forfeiture of items imported in violation of law. See, e.g., 19 U.S.C. 1305, 1497, 1595a. Seizure and forfeiture is also authorized for property involved in a wide variety of crimin[illegible]fenses. See, e.g., 18 U.S.C. 981; 21 U.S.C. 881. The government must provide constitutionally valid notice of such forfeitures, the procedures for which are generally supplied by the customs laws. See 18 U.S.C. 981(d); 21 U.SC. 881(d). Under 19 U.S.C. 1607(a), the government must provide notice by publication for three successive weeks and "[w]ritten notice * * * shall be sent to each party who appears to have an interest in the seized article." See generally *Dusenberry* v. *United States*, 534 U.S. 161, 163-166 (2002). If someone contests the forfeiture, the Government must commence a judicial forfeiture action, see 18 U.S.C. 983(a)(3) and 19 U.S.C. 1608, which requires the republication

of notice under Supplemental Rule for Admiralty and Maritime Claims C(4).[1]

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall * * * deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1.

STATEMENT

1. At the time of the events in this case, Arkansas law provided that "[s]ubsequent to receiving tax-delinquent land, the Commissioner of State Lands shall notify the owner, at the owner's last known address, by certified mail, of the owner's right to redeem by paying all taxes, penalties, interest, and costs" and to "indicate that the tax-delinquent land will be sold if not redeemed prior to the date of sale." Ark. Code Ann. § 26-37-301 (1997).[2] Arkansas law fur-

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[1] The Judicial Conference has transmitted to this Court a proposed revision to the Supplemental Rules. That revision would provide for the first time that the Government must send direct written notice of the judicial forfeiture action and a copy of the complaint "to any person who reasonably appears to be a potential claimant." Proposed Supp. R. G(4)(b)(i). The revision would also provide that notice to a person who was arrested when the property was seized, but who is not incarcerated when notice is sent, "may be sent to the address that person last gave to the agency that arrested or released the person." Proposed Supp. R. G(4)(b)(iii)(D); see Proposed Supp. R. G(4)(b)(iii)(E) (notice to non-incarcerated person from whom property was seized "may be sent to the last address that person gave to the agency that seized the property").

[2] The statute was subsequently revised to provide that, "[i]f the Commissioner of State Lands fails to receive proof that the notice sent by certified mail * * * was received by the owner of a homestead," the Commissioner shall provide "actual notice to the owner * * * by personal service of process." Ark. Code Ann. § 26-37-301(e)(1) (Supp. 2005) (effective Jan. 1, 2004). If petitioner is correct that he had not lived at

ther provided that, "[i]n the event that the address of the taxpayer changes, the taxpayer has an obligation to furnish the correct address." *Id.* § 26-35-705.

2. Petitioner purchased the property at issue in this case, located at 717 North Bryan Street, Little Rock, Arkansas, in 1967. He asserts that he resided there until 1993, when he moved to an apartment, but he continued to pay his property taxes through 1996. Petitioner's wife remained in the house. Petitioner did not notify the property tax collector of his new mailing address, as required by Ark. Code Ann. § 26-35-705 (1997). Pet. App. 2a.

Petitioner failed to pay his property taxes for the years 1997-2000. Pet. App. 2a. In 2000, the State mailed a certified letter to petitioner notifying him of the delinquency and stating that the property would be subject to a public sale on April 17, 2002. *Ibid.*; J.A. 12; see Supp. Add. before Ark. Sup. Ct. (Supp. Add.) 15-17. The return address on the envelope was "Commissioner of State Lands, 109 State Capitol, Little Rock, AR 72201-1012." Supp. Add. 18.

The letter was returned to the State marked "unclaimed" after three unsuccessful attempts by the Post Office to deliver it, on April 13, 19, and 29, 2000. J.A. 12; Supp. Add. 18. The State subsequently purchased a title report verifying petitioner's ownership of the property. J.A. 12; Supp. Add. 19. On April 1, 2002, a notice of the public sale, which also con-

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the property in question since 1993, see J.A. 10, the property would not have been his homestead when notice was given in 2000. See Ark. Ann. Code § 26-26-1122(a) (Supp. 2005) (defining "homestead" as a "dwelling of a person that is used as [the person's] principal place of residence"). In any event, the change in law would not suggest that the prior system was constitutionally deficient. See *Dusenbery* v. *United States*, 534 U.S. 161, 172 (2002) ("Even if one accepts that the * * * current procedures improve delivery to some degree, our cases have never held that improvements in the reliability of new procedures necessarily demonstrate the infirmity of those that were replaced.").

tained redemption information, was published in the newspaper. J.A. 12; Supp. Add. 22-24.

No bids were made at the time of the public sale, but on February 5, 2003, respondent Linda K. Flowers submitted a purchase offer to the State. Pet. App. 2a; J.A. 13; Supp. Add. 25. The State subsequently conducted additional research concerning the property, which showed that it remained titled to petitioner. J.A. 12; Supp. Add. 26. On February 19, 2003, the State sent another certified letter to petitioner at the property address, stating that the property would be sold on March 21, 2003, if the delinquent taxes and penalties were not paid.[3] Pet. App. 2a; J.A. 15-16. The return address on that envelope again read "Commissioner of State Lands" at the same address as the 2000 letter. Supp. Add. 28. The letter was returned to the State as "unclaimed" after the Postal Service apparently unsuccessfully sought to deliver it three times. Pet. App. 2a; J.A. 13; Supp. Add. 28. The State then sold the property to Flowers. Pet. App. 2a; J.A. 14.

An unlawful detainer notice was posted on the door of the property on or about July 2, 2003, after the expiration of the 30-day period in which petitioner could have redeemed the property. Pet. App. 2a. The notice stated that any occupants had three days to vacate the premises or a civil action could be brought against them, and ten days to vacate the premises before being subject to criminal prosecution. Petitioner's Add. before Ark. Sup. Ct. (Pet. Add.) 11.

3. Petitioner filed suit against Flowers and the Commissioner of State Lands on July 28, 2003, seeking to set aside the land sale and challenging the constitutionality of Ark.

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[3] A handwritten notation on the page showing the research that was conducted after Flowers made her offer indicates that instructions were given to send one notice by certified mail and one notice by "reg. mail," which could refer to "registered" or "regular" mail. See Supp Add. 26. The record, however, does not indicate whether such a duplicate notice was actually sent by either of those means.